

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SERVICE BUS CO., INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1981	:	
through August 31, 1984.	:	

Petitioner, Service Bus Co., Inc., 845 Nepperhan Avenue, Yonkers, New York 10703, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1981 through August 31, 1984 (File No. 802263).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 6, 1988 at 1:15 P.M., with all briefs to be submitted by April 10, 1988. Petitioner appeared by Sidney J. Leshin, Esq. The Audit Division appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly determined that petitioner was not entitled to a refund or credit for taxes paid on the sale to or use by petitioner as an omnibus carrier of any omnibus, and of parts, equipment, lubricants, motor fuel, diesel motor fuel, maintenance, servicing and repairs purchased and used by petitioner in the operation of its omnibus business.

II. Whether the estimated assessment calculated by the Audit Division was authorized and proper.

FINDINGS OF FACT

1. Petitioner, Service Bus Co., Inc. (hereinafter "Service Bus"), was in a transportation business providing charter bus service during the period June 1, 1981 through August 31, 1984 (the "audit period").

2. On June 4, 1984, the Audit Division sent petitioner a "appointment letter" which requested a field audit appointment date of June 21, 1984 and requested that all the books and records of the business be produced for the period June 1, 1981 through May 31, 1984. A field appointment was finally held on July 19, 1984 but very few books and records of the business were made available. In fact, despite numerous attempts and requests for said books and records, the only records ever produced to the Audit Division were a few annual sales tax returns, Federal income tax returns, depreciation schedules, cash receipts journal, a check disbursements journal and the general ledger through 1982. Except for five purchase invoices produced in March of 1988, following formal hearing, no purchase invoices were ever produced to the Audit Division for their review.

The Audit Division never received a copy of the Certificate of Public Convenience and Necessity for the operation of a bus line purportedly run by Service Bus between points in Westchester County and New York City. Subsequent to formal hearing, Service Bus submitted an order of the Department of Transportation, dated November 29, 1982, which extended the temporary Certificate of Public Convenience and Necessity which expired on November 15, 1982 until November 15, 1983. However, said certificate was issued to Service Transit Corporation not to petitioner. It is noted that said certificate issued to Service Transit Corp. on November 29, 1982 was assigned the case number 29652. An appendix attached to the copy of the certificate submitted into evidence with petitioner's brief as Exhibit "B" was an appendix setting forth the route or bus line covered by the certificate. However, the case number on the appendix was 30223.

3. When the Audit Division made its examination of the books and records which were made available to them by petitioner, it was able to discern that the petitioner provided transportation to two school districts, as well as charter trips and express bus service in Westchester and New York City and Atlantic City, New Jersey. An examination of the sales tax returns filed by petitioner indicated that petitioner had no taxable sales and therefore a test of same was not made.

Instead, the Audit Division did a test of all expense purchases for the audit period by examining the general ledger and cash disbursements of petitioner for the period June 1, 1981 through November 30, 1982. Actual expense purchases for that period were taxed in their entirety and an average of the six quarters was taken and applied to the remaining quarters in the audit period ended August 31, 1984. Added to each of the quarters was the expense for bus leasing subject to use tax. The total purchases subject to use tax, expense purchases and bus leasing expense, were added together for each quarter and the appropriate tax rate applied.

4. On April 3, 1985, the Audit Division issued to Service Bus a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth a total tax due of \$122,522.20 and interest of \$28,024.39, for a total amount due of \$150,546.59.

SUMMARY OF PETITIONER'S POSITION

5. Petitioner contends that it was in the transportation business during the audit period and that a certain percentage of its lease expense was not subject to sales or use tax because it was for a transportation service. Petitioner also contends that based upon the five expense purchase invoices issued by Universal Coach Parts, Inc. of Edison, New Jersey totalling \$719.88 indicates that petitioner was charged sales tax on its expense purchases and it paid sales tax on said purchases. Based upon these five invoices, petitioner contends that a credit should be given for the entire audit period.

Petitioner also contends that it operated an omnibus line in local transit service as that term is defined in Tax Law § 1119(b) and that based upon the itinerary set forth in the Certificate of Convenience and Necessity, more fully set forth in Finding of Fact " " above, a mileage percentage should be calculated to properly attribute parts and supplies used in the omnibus service to taxable and nontaxable categories.

CONCLUSIONS OF LAW

A. Tax Law § 1119(b) provides that a refund or credit shall be allowed for any taxes paid pursuant to Tax Law § 1105(a), (c) or Tax Law § 1110 on the sale or use by an omnibus carrier of any omnibus, and of parts, equipment, lubricants, motor fuel, diesel motor fuel, maintenance, servicing or repair purchased and used in the operation of any such omnibus by such carrier. Petitioner provided no proof that it was an omnibus carrier including the Certificate of Convenience and Necessity which was attached to its brief since said brief was issued to another corporation which was never linked evidentially to petitioner. Furthermore, no evidence was submitted upon which a percentage could be calculated which would determine the proportion that such carrier's vehicle mileage and local transit service bears to the total mileage of the carrier in the State of New York. The argument for said percentage set forth in petitioner's brief is totally unfounded and speculative.

B. Tax Law § 1110 provides that a use tax shall be imposed on every person for the use within this State of any tangible personal property purchased at retail. Tax Law § 1132(c) provides that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of Tax Law § 1105 shall be presumed to be subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect the tax or the customer (emphasis added).

C. By virtue of the fact that petitioner was unable to produce any records whatsoever other than its general ledger, tax returns, disbursement journals, depreciation schedule and cash receipts journal, five invoices for purchases and a Certificate of Convenience and Necessity for a company other than petitioner, the Audit Division was within the authority conferred upon it by Tax Law § 1138 to resort to external indices in order to verify the accuracy of the sales tax returns filed by petitioner.

Further, where it was petitioner's own failure to maintain proper books and records, it cannot question the accuracy of the method used in determining the amount of sales and use taxes due (Markowitz v. State Tax Commn., 54 AD2d 1023, affd 44 NY2d 684). Although petitioner claimed that it was burglarized and that a police report was made, it never produced same.

Likewise, petitioner's argument that certain expenses for leasing should not be subject to tax for the reason that petitioner was in the transportation business was without any documentation whatsoever. Any credit could not be proportionately applied.

D. Petitioner bears the burden of proving that the Audit Division was erroneous in assessing the amount of the tax deficiency (Matter of Surface Line Operators Fraternal Organization v. Tully, 85 AD2d 358, 359). Petitioner relied on the five invoices it found from Universal Coach Parts, Inc. and the Certificate of Convenience and Necessity issued to another company. As discussed above, due to petitioner's inadequate records and the few invoices produced, it is impossible to accept petitioner's rationale for adjustments in the assessment issued by the Audit Division.

E. The petition of Service Bus Co., Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 3, 1985 is sustained.

DATED: Albany, New York

ADMINISTRATIVE LAW JUDGE